NO. 48082-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROWLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper admission or irrelevant and highly prejudicial evidence denied appellant a fair trial.

2. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Appellant was charged with felony harassment by threatening to kill a deputy sheriff. The deputy was permitted to testify over defense objection about his knowledge of appellant's non-violent prior criminal activity, as a basis for his fear that appellant would carry out the threat. Where this testimony had little if any relevance and was unduly prejudicial, did admission deny appellant a fair trial?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant William Travis Rowland, by amended information, with three counts of domestic violence court order violation, two counts of felony harassment,

and one count of fourth degree assault. CP 4-7; RCW 26.50.110(5); RCW 9A.46.020; RCW 9A.36.041. The case proceeded to jury trial before the Honorable Kitty-Ann van Doorninck. The jury acquitted Rowland on one count of felony harassment and entered guilty verdicts on the remaining counts. CP 87-96, 138-41. The court imposed a standard range sentence of 60 months, and Rowland filed this timely appeal. CP 142, 154.

2. Substantive Facts

Pierce County Sheriff's Deputies were dispatched to a domestic dispute at the Rosoto residence in Graham. Kimberly Rosoto, who called 911, lived in the main house on the property with her parents. Kimberly's daughter, Nicole Rosoto, lived in an apartment in the detached garage with her boyfriend, William Travis Rowland, even though there were court orders in place prohibiting Rowland from having contact with Nicole Rosoto. RP 125, 128, 237, 353.

It is undisputed that there was an argument between Kimberly Rosoto and Rowland. Rosoto reported that Rowland slapped a cigarette out of her mouth and then held her on the ground. RP 127-28. Rowland testified that he was trying to prevent Nicole Rosoto from leaving because she had just gotten high on heroin, Kinberly Rosoto intervened and came at him with a knife, and he slapped the knife out of her hand and held her

wrist until she calmed down. When he released her hand, she called 911. RP 342-45.

When Deputy Brian Heimann arrived he spoke briefly with Kimberly Rosoto. He then contacted Rowland, who was waiting outside for the deputy to arrive. RP 290, 311. Rowland was bleeding profusely from a cut on his finger, and when Heimann asked him what happened, Rowland told Heimann to do his job and find out. RP 291. Heimann administered first aid and then passed Rowland off to the medics who had arrived to treat him. RP 292. After Rowland was treated, Heimann placed him under arrest for violation of court orders and fourth degree assault. RP 299.

Rowland required further medical treatment, and Heimann took him to the hospital before taking him to jail. RP 300, 302. Rowland remained handcuffed the entire time, even while his injury was being treated. RP 322. Rowland, who was high on methamphetamine, made several statements to Heimann over the few hours they were together. RP 248, 299-303, 309. First, as he was being placed in the patrol car, Rowland pointed out a sign on the Rosotos' property which said "Trespassers will be shot, survivors will be shot again." RP 300. Rowland then said Heimann was violating his rights and that he could make one call to Nicole and this would all be over. RP 300. At the

hospital Rowland yelled loudly that the deputy was violating his rights and said several times that he would shoot Heimann with a shotgun. He drew attention to himself, saying he was being arrested unlawfully and held against his will. He also said he hoped Heimann had a daughter so he could watch her die. RP 301. Rowland then told Heimann he would kill Heimann, Heimann would burn, it would be easy to find Heimann, and he could make one call to Nikki and she would call a Mexican. RP 302. On the way to the jail Rowland repeated that Heimann was violating his rights and said he would put a bullet through Heimann's eyes and kick his ass. RP 302. When Heimann told Rowland he was adding charges based on Rowland's threats, Rowland told him it wasn't a threat and he better watch his back. RP 303.

A few days later Rowland wrote Heimann a letter apologizing for his behavior and what he said the night he was arrested. He said he was high on methamphetamine and didn't remember everything he said, but he did not mean to threaten the lives of Heimann or his family. RP 305. He also offered to provide information about drug dealers in exchange for help removing the no contact orders. RP 306.

Rowland was charged with felony harassment based on his statements to Heimann. Prior to trial the State moved to allow Heimann to testify about Rowland's criminal background and lifestyle to prove

Heimann reasonably feared Rowland would carry out his threats. RP 74; CP 17. The prosecutor indicated that Heimann was very familiar with the Rosoto house, having been there on numerous calls, he knew Rowland, and he knew Rowland was involved with drugs and the criminal element, and for those reasons he took Rowland's threats seriously. RP 74. Defense counsel objected, and the court denied the motion, finding that the content of Rowland's statements speaks for itself and the deputy's proposed testimony was too prejudicial. RP 76-77.

At trial Heimann testified about his encounter with Rowland, the fact that Rowland was obviously high on methamphetamine, and the statements Rowland made in those circumstances. RP 299-303, 309. He testified that he took Rowland's statements seriously as threats to his life and the lives of his family members, and he believed Rowland was capable of carrying them out. RP 303.

On cross exam, defense counsel asked Heimann if Rowland was the first person who ever threatened him. The prosecutor objected, and the jury was sent out of the courtroom. RP 325. Defense counsel explained that he was trying to show that threats are relatively routine in Heimann's line of work. In response to the prosecutor's argument that the question opened the door to Heimann's knowledge of Rowland's prior criminal acts, counsel argued that because Rowland had no history of threats or

violence, his criminal activities were not relevant to establish reasonable fear. Moreover, even if Rowland's criminal acts were relevant, they should be excluded as unfairly prejudicial. RP 325-27.

In an offer of proof, Heimann testified that he was extremely familiar with Rowland; he had been to the Rosoto house numerous times relating to domestic violence assault, drug use, stolen vehicle recovery; he had arrested Rowland two or three times; and he knew Rowland was well-connected with drugs and the drug cartel in the area. RP 327-29. The court ruled that if defense counsel continued to ask questions about other threats Heimann had received, it would allow Heimann to testify to the information presented in the offer of proof. RP 331.

When the jury returned, Heimann testified that in his job he had been threatened more times than he can count, with threats similar to the statements Rowland had made. RP 332. On redirect he testified that he was familiar with Rowland prior to this incident and he had been to the residence many times for assaults and other calls. He was familiar with Rowland in the community as an avid drug user and someone with connections to the drug world, the Mexican cartel, and the drug mafia. RP 335. He felt this knowledge contributed to the fear that the threats would be carried out. RP 336. He acknowledged that he had no proof Rowland was connected to the Mexican mafia and that the most serious crime he

had arrested Rowland for was possession of paraphernalia. RP 336. The court instructed the jury that it could consider Heimann's knowledge of Rowland prior to the incident only for the purpose of proving his reasonable fear that the threats would be carried out. CP 108.

Rowland testified that he did not remember making any of the threats Heimann testified about. As he explained in his letter to Heimann apologizing for his actions, he was under the influence of methamphetamine at the time. RP 350-51.

C. ARGUMENT

1. ADMISSION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL TESTIMONY REGARDING ROWLAND'S PAST CRIMINAL BEHAVIOR DENIED ROWLAND A FAIR TRIAL.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court has noted the reasoning underlying this rule:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even

> though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)), review denied, 124 Wn.2d 1022 (1994).

To be admissible under ER 404(b), evidence of other conduct must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Salterelli, 98 Wn.2d at 361-62.

While evidence of prior conduct is never admissible to prove the defendant's propensity to commit a crime, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); Wade, 98 Wn. App. at 333. But before such evidence can be admitted the court must balance its probative value against its prejudicial effect, and evidence

that is unfairly prejudicial must be excluded. Wade, 98 Wn. App. at 333-34. "Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." Wade, 98 Wn. App. at 334 (citing Saltarelli, 98 Wn.2d at 362).

Rowland was charged with felony harassment of Deputy Brian Heimann. To convict Rowland, the State had to prove Rowland knowingly threatened to kill Heimann and by words or conduct placed Heimann in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b); CP 5, 120. This charge requires proof that Heimann subjectively felt fear and that that fear was reasonable. See State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

While Heimann's reasonable fear was an essential element the State had to prove, evidence of Rowland's prior criminal activity was not sufficiently probative of that element to outweigh the danger of unfair prejudice from its admission. Heimann knew Rowland claimed to be connected to a drug cartel or mafia, but he admitted he had no proof that was true, and the most serious offense he had arrested Rowland for was possession of drug paraphernalia. While Heimann was familiar with Rowland and the Rosoto family through various domestic disturbances at their residence, Rowland had no history of violent acts or threats.

Rowland's prior criminal activity was not so probative of a basis for fear that it outweighed the substantial danger of unfair prejudice.

As the court recognized prior to trial, testimony about Rowland's prior criminal activity was unfairly prejudicial. RP 77. Defense counsel's cross examination of Heimann regarding his claim that he feared Rowland would carry out the threats did not make Rowland's prior criminal activity any less prejudicial. And given the limited probative value of the evidence, Heimann's testimony served only to allow the jury to conclude that Rowland was a criminal type who must be guilty of knowingly threatening Heimann as he was charged with doing. The court abused its discretion in admitting the testimony.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

At sentencing, the court below imposed only the minimum legal financial obligations required by law, finding Rowland lacks the ability to pay LFOs. RP 438; CP 152. The court also entered an order of indigency finding that Rowland was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 170-71.

a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22,

43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal.

Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Rowland has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover,

indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts

should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Rowland respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. Alternatively, this court should remand for superior court fact-finding to determine Lewis's ability to pay.

In the event this court is inclined to impose appellate costs on Rowland should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Rowland to assist him in developing a record and litigating his ability to pay.

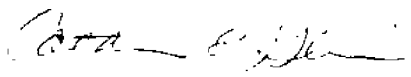
If the State is able to overcome the presumption of continued indigence and support a finding that Rowland has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

Improper admission of propensity evidence denied Rowland a fair trial, and his conviction should be reversed. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED April 15, 2016.

Respectfully submitted,



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